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IN THE

Supreme Court of the United States

October Term, 1970.

No. 941

CHARLES RIVEZZO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Charles Rivezzo, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 24, 1970.

OPINION BELOW.

The opinion of the Court of Appeals for the Second Circuit in this case is reproduced in Appendix A (pp. A1-A11), *infra*. The opinion is not yet officially reported.

JURISDICTION.

This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1). The judgment of the court below was rendered on July 24, 1970. Appendix B (p. A12). A timely petition for rehearing or for rehearing *en banc* was denied on October 13, 1970. Appendix C (pp. A13-A14).

QUESTIONS PRESENTED.

I. Whether a wrongful scheme for the use of a credit card constitutes a violation of the Federal Mail Fraud Statute.

II. Whether petitioner was properly convicted, by use of the *Pinkerton* doctrine, of twenty substantive counts of mail fraud, based upon his participation in an unlawful deal for the sale of a machine for making counterfeit credit cards to be sold to third parties, where the substantive counts involve the personal use of a credit card stolen by one of the persons also involved in the deal for the sale of the machine.

A. Should the case have been submitted to the jury?

B. Were the instructions legally sufficient and proper?

III. Whether the crude introduction into evidence, in a conspiracy trial before a jury, of documents and testimony tending to show large numbers of offenses similar but unrelated to the scheme of which the defendants were charged, can be justified on the ground that the extraneous evidence was a "colorful backdrop," or was an illustration of the size of the potential loss that might have been inflicted by defendants' scheme, or was "collateral to the facts upon which the conspiracy was based."

STATUTES INVOLVED.

18 U. S. C. § 371 provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of a conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both."

18 U. S. C. § 1341 provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything representing to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail according to the directions thereon or at the place at which it was directed to be delivered to the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years or both. . . ."

STATEMENT OF THE CASE.

This is a prosecution under the Federal Mail Fraud Statute, 18 U. S. C. § 1341. Petitioner and four other defendants were convicted of twenty substantive counts under this statute, and, under 18 U. S. C. § 371, of conspiracy to violate the Mail Fraud Statute. Trial was by jury in the District Court for the Southern District of New York (Pollack, D. J.). Petitioner was sentenced to a prison term of two years on each count, the sentences to run concurrently. The judgment was affirmed by the Court of Appeals for the Second Circuit (Moore and Feinberg, C. JJ.; Bonsal, D. J.).

The Primary Transaction.

The prosecution's case rests on the testimony of Joseph Pucci, who pleaded guilty to the conspiracy charge and to eleven of the substantive counts[1] (Tr. 457).[2] Pucci's testimony tended to show that the defendants had agreed to a scheme for the sale of a machine and related supplies to manufacture bogus Diners' Club credit cards. The function of the machine was to emboss blank cards with the names and pertinent data of credit card holders. In addition to the embossing machine, the seller was to provide a quantity of unembossed, blank Diners' Club cards and the names and account numbers of actual holders of Diners' Club cards (Tr. 150-170). The sole purpose of manufacturing the bogus cards was to sell them to third parties (Tr. 230).

Central to the scheme was one Alphonse Confessore, an employee of the firm that regularly prepared credit cards for the Diners' Club (Tr. 35-40). Confessore had access to the machines and the technology of embossing the cards (Tr. 40). Confessore decided to try to sell a portable machine that he asserted could emboss credit cards in the same man-

1. After this trial, Pucci was placed on probation.

2. References with the prefix "Tr." refer to the stenographer's transcript of the proceedings in the District Court.

ner as the larger, permanently installed machines used by his employer. Confessore's efforts, through a neighbor, to find a buyer for the machine soon led him into contact with Pucci (Tr. 148-156). Confessore was asking $7,500 for the machine alone, without any unembossed cards (Tr. 155-156). Confessore did offer to include IBM cards containing actual cardholders' names and account numbers (Tr. 157).

Pucci, who was unemployed and living on the illegal use of a credit card (Tr. 150, 224), undertook to find a buyer for the machine. At their first meeting, Confessore gave Pucci an embossed Diners' Club card that he had made at his employer's plant. "I asked Mr. Confessore for one of the cards for myself to use to stay at the hotels to eat with, and he gave me one with an Irishman's name on it." (Tr. 156). Pucci never used that card (Tr. 156).

Thereafter Pucci contacted one Travers (Tr. 158-162), who insisted that a supply of unembossed cards must be included (Tr. 158). Confessore resisted because he anticipated that, after selling the machine, he would continue making sales of unembossed cards to the machine owner (Tr. 226, 247, 266). Acceding to Travers' demand, Confessore modified his offer to include 500 unembossed credit cards with the machine for the $7,500 (Tr. 160, 231). Travers directed that the price of the package to the buyer would be stated as $10,000, with the incremental $2,500 to be divided between Travers and Pucci, "for setting this all up." (Tr. 160).

Thereupon, Travers brought in petitioner as the ultimate buyer (Tr. 161-162). The deal was described by Pucci: ". . . he wanted to know what he was going to get. I told him the machine, 500 blanks, IBM cards with the cardholders' names and addresses for $10,000." (Tr. 162). Pucci showed petitioner the card that Confessore had given him "as a sample." (Tr. 162). At petitioner's request, a meeting was arranged for him to see the machine operate.

It was understood that if the machine did not work, there was no deal (Tr. 232-233). The point of the scheme was to produce credit cards to be sold by the conspirators to third parties (Tr. 230). There was no contemplation that any of the conspirators would use the bogus cards after they had been embossed.

On two subsequent occasions, Confessore tried to make the machine work. In each instance he failed (Tr. 163-168, 171-174, 234-235). At no point was there any use of the mails in connection with this abortive scheme. Nothing was placed in the mails by the defendants; nothing was taken from the mail by any defendant; nothing was caused to be delivered by mail.

Pucci and the Giletto Card.

While the first test of the machine was going on, Pucci went through a box of embossed Diners' Club cards that Confessore had brought with him (Tr. 163-164, 167). This was done without Confessore's knowledge or consent (Tr. 244). Pucci testified: "I went through the box of embossed cards and I took out two cards for myself and put back the Irishman's card, the card with the Irish name on it because it didn't fit my description." (Tr. 167). One card was in the name of Joseph C. Giletto; this Pucci took for his own personal use (Tr. 244). The other card, bearing a woman's name, he intended to give to his girl friend (Tr. 167).

The contact with the mails in this case came about entirely as a result of the personal actions of prosecution witness Pucci in using the Giletto card. Pucci used the Giletto card to make ten purchases of goods or services (Tr. 182-184, 189-200). In several instances defendant Travers was also present and participated in the purchases. Pucci flatly and unequivocally testified that the embossed

cards in Confessore's possession were never part of the deal to sell the machine and related supplies to petitioner. This testimony is critical enough to warrant its inclusion in full as an appendix to this petition (Appendix C).

The twenty substantive counts under the Mail Fraud Statute all derive from Pucci's ten purchases. In each instance, the supplier mailed an invoice to the Diners' Club. In each instance, the Diners' Club mailed a remittance to the supplier (Tr. 389-397). The twenty mailings underlie the substantive counts and the conspiracy count. They are the sole basis for assertion of federal jurisdiction in this case.

The Prosecution's Evidentiary Morass.

For reasons not very clear, the prosecution deliberately obfuscated the record with a morass of evidence involving credit card frauds and other illegal activity completely unrelated to the offenses charged against the defendants. The Government produced lists compiled by Diners' Club investigators of over 1,000 entries showing fraudulent charges against Diners' Club in excess of $700,000 (Tr. 96-103, 107-113). The prosecutor introduced some 224 embossed Diners' Club cards, involved presumably in fraudulent schemes, but not connected with the crimes charged in this case (Tr. 70-78). In addition, the record was contaminated with irrelevant, prejudicial evidence concerning activities of individual defendants outside the matters in the indictment. The Government's very first witness was asked to testify to receiving an American Express credit card from Confessore prior to the commencement of the alleged conspiracy (Tr. 12-30). Another witness testified to purchasing blank credit cards from defendant Travers after the arrests of Confessore and Pucci in this case (Tr. 344-346). Pucci himself was interrogated by the prosecutor

concerning an illegal proposition put to Pucci by Confessore whereby Pucci might earn $75,000 (Tr. 178-179). Of this morass, despite vehement defense objections, only the lists compiled by the Diners' Club investigators and the Pucci testimony on the $75,000 proposition were stricken (Tr. 451).

Submission to the Jury.

The question whether there was a relationship between Pucci's ten purchases and the deal for a $10,000 sale of an embossing machine and supplies was put to the jury in a most garbled fashion by the trial judge in his instructions. Indeed, the trial judge made it almost impossible for a jury to comprehend the issue.

> "It is contended here that the government has failed to prove the existence of only one conspiracy, but has proved several separate and independent conspiracies involving various of the defendants. Proof of several, separate and independent conspiracies is not proof of the single conspiracy charged in the indictment, and if you find that the government has failed to prove the existence of one conspiracy, you must find the defendants not guilty.
>
> "In determining whether there was a single conspiracy, you may consider what the evidence shows as to changes of personnel and activity. You may find a single conspiracy even though there were changes in personnel and activities, provided you find that some of the conspirators continued throughout the life of the conspiracy *and that the purposes of the conspiracy continue to be those charged in the indictment.*
>
> "In other words, if at all times the alleged conspiracy had the same primary purposes and the same

nucleus of participants, the conspiracy would be the same basic scheme, even though in the course of its operation additional conspirators joined in and performed additional functions to carry out that scheme.

"On the other hand, if you find that one conspiracy terminated and another was formed, you may not find a single conspiracy, even though the purposes of both conspiracies were the same and that some of the defendants were members of both." (Tr. 606-607) (Emphasis supplied.)

This instruction is obviously inadequate to inform the jury as to the relationship of the Giletto card transactions and the deal for the sale of the machine. The independence of Pucci's personal actions is not indicated by a termination of one conspiracy and the formation of another; the temporal sequence of events is not the significant element, although in fact nearly all of Pucci's purchases came after the last abortive effort by Confessore to make the machine work. Nor is a change in personnel relevant, since Pucci admittedly was a link in the transaction for sale of the machine.

Moreover, the instruction plainly declares that the conspiracy alleged in the indictment is a single conspiracy. The indictment alleges, of course, that the Pucci purchases are part of the conspiracy. This allegation wholly fails for want of proof.

The instruction given precluded the jury from determining that Pucci's behavior was independent of the deal that underlies the conspiracy charge.

Following strenuous objection by counsel for petitioner, the court added to the instructions, but the added portions did not cure the garbled submission.

"Now, I think I have said this in substance, but I want to make it clear, that if any conspirator among

> the six conspirators named, which are the five defendants on trial and the defendant Pucci, who is not on trial, used a card, you must find beyond a reasonable doubt that such use was in furtherance of the primary object of the conspiracy because if it was not in furtherance of the primary object of the conspiracy, such use would not be attributable to the other defendants." (Tr. 672).

The court here spoke literally only in terms of the attribution of one conspirator's behavior to co-conspirators, not to the fundamental necessity for finding that Pucci's acts were an integral part of a single conspiracy in order to bring in a verdict of guilty. Moreover, the court did nothing to dispel its earlier charge to the jury that the indictment stated a single conspiracy, despite lack of evidence to support that allegation.

Worst of all, perhaps, was the trial court's mischaracterization of the defense contention as to the significance of the independence of Pucci's actions.

> "The government has argued that the central scheme was one to defraud Diners' Club and that the use of the mails was reasonably incidental and to be anticipated. Counsel for the defendants have said that the scheme did not exist and, in any event, no more was shown by the government's evidence than a scheme to buy a machine and cards and the names of card holders and to sell the cards and that no showing was made that the purpose of the scheme was to defraud the Diners' Club and the conceivably related use of the mails." (Tr. 597).

It was plainly the trial courts theory that a charge of conspiracy to defraud the Diners' Club, *regardless of the*

means, was a sufficient statement of a single conspiracy large enough to bracket the machine deal and the personal acts of Pucci (Tr. 570-571).

Verdict, Judgment and Appeal.

The jury returned a verdict of guilty as to the conspiracy count and the twenty substantive counts under § 1341 against all defendants (Tr. 679-680). In addition, the jury found the defendants guilty of a twenty-first substantive count, charging them under § 1342 of the Mail Fraud Statute with carrying on, by means of the mails, a fraudulent scheme by use of assumed name. The trial court granted defense motions to enter judgment of acquittal as to this last substantive count (Tr. 682-683). The court had given a stunted charge on this count (Tr. 670-672), and thereafter had expressed the view that it had probably committed error (Tr. 675). This count, of course, applies directly to Pucci's independent behavior in use of the Giletto card by assuming the name of Giletto. Pucci had pleaded guilty to this count (Tr. 457). Notwithstanding the acquittal on the assumed name count, the trial court denied defense motions on all the other counts deriving from Pucci's behavior and imposed sentence.

The Court of Appeals affirmed. Portions of its opinion have significance to a statement of the facts. It may be noted that the appellate court viewed the factual implications of "Pucci's surreptitious filching of a card to replace the card Confessore had given him and a card for his girlfriend" as presenting "a more serious problem" whether such behavior could be "a plausible part of the conspiracy." (App. A p. A8). Justifying affirmance, the court declared:

> "However, the indictment charged only a single conspiracy. It was for the jury to determine whether Pucci's and Travers' activities came within the pur-

> poses of that conspiracy and in pursuance thereof. If, as the jury must have found, Rivezzo was a member of the conspiracy, he was properly convicted under the *Pinkerton* doctrine on the substantive counts as well." (App. A p. A8)

The Court of Appeals upheld the admission of the prosecution's evidentiary omnium-gatherum on two grounds: Speaking first to the Diners' Club investigators' lists and the 224 cards, the court put a monumental non-sequitur:

> "In this case the testimony and exhibits supplied a colorful backdrop and illustrated the size of the potential loss which might be inflicted on Diners' Club by the success of the conspiracy but their introduction does not constitute reversible error because the proof of the conspirators' act was more than adequate to enable the jury to find them guilty regardless of the monetary damage inflicted on Diners' Club under other circumstances." (App. A p. A10)

On the prejudicial testimony to the unrelated criminal activities which had some connection with a defendant but none with the indictment, the court stated that reversal was not required. Making a virtue out of the vice, the court said:

> "At most they were collateral to the facts upon which the conspiracy was based." (App. A p. A10)

REASONS FOR GRANTING THE WRIT.

I. Whether a Wrongful Scheme for Use of a Credit Card Constitutes a Violation of the Federal Mail Fraud Statute.

In many ways, the most significant and far-reaching conclusion of the lower courts in this case is that the wrongful use of a credit card by a person not the owner of the card constitutes a violation of the Federal Mail Fraud Statute, 18 U. S. C. § 1341. This Court has previously held flatly to the contrary in *Parr v. United States*, 363 U. S. 370 (1960). Despite the clarity and unqualified nature of this Court's decision in *Parr*, there has been erosion in the lower courts, notably in the Court of Appeals for the Fifth Circuit. By this case, the departure from *Parr* is followed by the Court of Appeals for the Second Circuit. Plainly, it is time again for this Court to declare its position that the illegal use of credit cards does not constitute a federal offense.

Parr involved an allegation that two defendants had fraudulently obtained gasoline and other filling station products and services for themselves upon the credit and at the expense of a school district which they controlled. The indictment charged that the defendants knew that the oil company would use the mails in billing the School District for these things. This Court held that it cannot be said that the mailings in question were "for the purpose of executing" the scheme to defraud, since the scheme had reached fruition when the defendants had received the goods and services complained of and before the mailings occurred. 363 U. S. at 392-393.

Notwithstanding the clean line drawn in *Parr*, the Court of Appeals for the Fifth Circuit has ruled precisely to the contrary. Two of the Fifth Circuit decisions are cited by the court below: *Kloian v. United States*, 349 F. 2d

291 (5th Cir. 1965); and *Adams v. United States*, 312 F. 2d 137 (5th Cir. 1962). The Fifth Circuit has handed down another holding of the same kind only last July. *United States v. Thomas*, 429 F. 2d 407 (5th Cir. 1970). In all three cases, the Fifth Circuit has purported to distinguish *Parr* on a patently invalid basis. The asserted distinction is that the fraud in *Parr* was in the form of a breach of trust, while the later cases involve frauds not based on breach of fiduciary obligation. The distinction is surely invalid, since the rationale in *Parr* goes to the nature of the use of the mails and not to the nature of the fraud.

Taking the present indictment as charging a single conspiracy, an assumption that we accept here only for purposes of argument, there is no distinction between this case and the prosecution in *Parr*. Assuming *arguendo* that the scheme involved the conspirators in the use of a credit card by Pucci in making the ten purchases of goods and services, there is no *federal* crime charged. As in *Parr*, the scheme in each case had reached fruition when Pucci or others received the goods and services complained of. The persons intended to receive the goods and services had received them irrevocably. It was immaterial to them, or to the consummation of the scheme, how the suppliers would collect from Diners' Club. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.

Compare this Court's own language in disposing of the *Parr* case insofar as the fraudulent use of credit cards was concerned:

> "Here, as in *Kann* [323 U. S. 88 (1944)], '[t]he scheme in each case had reached fruition' when Carrillo and Garza received the goods and services complained of. 'The persons intended to receive the [goods and services] had received [them] irrevocably.

> It was immaterial to them, or to any consummation of the scheme, how the [oil company] . . . would collect from the [District]. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.' 323 U. S., at 94." 363 U. S. at 393.

The court below and the Court of Appeals for the Fifth Circuit have taken some false comfort in flouting this Court's decision by citation to *United States v. Sampson*, 371 U. S. 75 (1962). *Sampson* is not a credit card case. This Court held that the mailings in that case, which significantly went directly from the defendant to his victims, were sufficient to violate the statute even though they were made after the defendants had received the money they intended to get from each victim. The decision rested solely on the allegations of the indictment, since the case came before this Court on appeal from a decision dismissing the indictment. The indictment alleged that defendants' plan called for mailings after the money had been obtained "for the purpose of lulling said victims by representing that their applications had been accepted and that the defendants would therefore perform for said victims the valuable services which the defendants had falsely and fraudulently represented they would perform. . . . In short, the indictment alleged that the scheme, as originally planned by the defendants and as actually carried out, included fraudulent activities both before and after the victims had actually given over their money to the defendants. Of course, none of these charges have been established by evidence, but at this stage of the proceedings the indictment must be tested by its sufficiency to charge an offense." 371 U. S. at 78-79.

There is no parallel to the credit card cases from *Sampson*. After the wrongful use of a card, the holder does not engage in subsequent fraudulent activity to lull

the victims by use of the mails. All the fraudulent activity precedes the use of the mails in each case. The mails are used thereafter, not by the guilty parties as in *Sampson*, but by the victims in seeking recompense for the goods and services provided to the guilty party. There is no fraudulent activity "after the victims had actually given over their [goods and services] to the defendants."

This question of the availability of federal prosecution for fraudulent use of credit cards is manifestly a most serious one for the federal system. One needs no elaborate argument to demonstrate the vastness of the credit card system in the United States and the rapidity of its continuing expansion. Several years ago, it was reliably estimated that there were already 140,000,000 credit cards in circulation. *Davenport*, Bank Credit Card and the Uniform Commercial Code, 1 Valparaiso U. L. Rev. 218, 219-221 (1967). This year marks the twentieth anniversary of the first credit card issued to be honored at a wide variety of establishments. By coincidence, the developer of that system was Diners' Club, Inc.

The potential for growth in the use of credit cards is still enormous. See *Bergsten*, Credit Cards—A Prelude to the Cashless Society, 8 Boston Coll. Ind. & Comm. L. Rev. 485 (1967). The potential for criminal prosecutions arising out of such a vast circulation is also enormous. One report a few years ago offers the astonishing estimate that in 1965, of the 140,000,000 credit cards in circulation, over 1,000,000 were reported lost or stolen. 21 Personal Finance L. Q. 44 (1967). The irrelevant morass of evidence introduced into this case by the prosecution on the frequency and seriousness of frauds committed against the Diners' Club neatly underscores the risk of extravagant expansion of federal criminal prosecution.

The ten years that have passed since this Court's decision in *Parr* have witnessed giant steps toward a credit

card economy. Due concern for the proper utilization of the finite capacity of the federal system of criminal justice requires this Court to move to stop the incursions by the Second and Fifth Circuits into matters that are best left to local jurisprudence. Plainly the matter is one of urgent consequence that warrants this Court granting the writ of certiorari.

Since nothing that has intervened in the past decade suggests any greater need now for federal criminal prosecution of frauds in this area, this Court may well agree with this submission that the issue raised by the petition is plainly governed by prior cases and that the case is therefore appropriate for summary disposition. In this respect, the dismissal of the substantive counts necessarily requires dismissal of the conspiracy count as well. Again, a precisely analogous legal situation arose in the *Parr* case. 363 U. S. at 393.

II. Whether Petitioner Was Properly Convicted, by Use of the *Pinkerton* Doctrine, of Twenty Substantive Counts of Mail Fraud, Based Upon His Participation in an Unlawful Deal for the Sale of a Machine for Making Counterfeit Credit Cards to Be Sold to Third Parties, Where the Substantive Counts Involve the Personal Use of a Credit Card Stolen by One of the Persons Also Involved in the Deal for the Sale of the Machine.

Nearly twenty-five years ago, this Court held that a person who joins a conspiracy is liable to conviction not only for the conspiracy, but also for the substantive offenses that are committed by his co-conspirators in furtherance of the unlawful project. *Pinkerton v. United States*, 328 U. S. 640 (1946). The *Pinkerton* doctrine was employed in this case to convict petitioner and his co-defendants not only of conspiracy, but also of twenty substantive counts of mail fraud.

Each substantive count carried a potential maximum sentence of five years in prison and $1,000 fine. Petitioner contends that the prosecution improperly linked him to twenty substantive counts that were outside the scope of the unlawful enterprise with which he was connected, that the evidence of a single conspiracy was grossly insufficient to justify submission of the case to a jury, and that the instructions to the jury on the unitary or divided nature of the enterprise were inadequate and improper.

In *Pinkerton*, "a single conspiracy was charged and proved." 328 U. S. at 642. "We have here a continuous conspiracy." *Id.* at 646.

> "A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement. But as we read this record, that is not this case." *Id.* at 648.

Throughout this prosecution, petitioner has strenuously contended that this is not a case of a single, unitary, continuous conspiracy. There were two separate and essentially unrelated transactions. One involved the sale and transfer of an embossing machine which, had it worked, would have permitted the manufacture of counterfeit Diners' Club credit cards to be sold to third parties. The other was Pucci's personal use of a Diners' Club card to buy goods and services to meet his own needs and desires. Pucci was also involved in the scheme to sell and set up the embossing machine. Pucci surreptitiously filched the card he used in his buying spree from one Confessore, who was also a party to the embossing machine deal. Pucci, the only witness who testified to either transaction, unequivocally denied that there

was any connection between the two. His testimony on this score has been reproduced in the Appendix to this Petition (App. D pp. A14-A18). No evidence was introduced that linked the unrelated transactions. Yet petitioner and his co-defendants were convicted and sentenced as being vicariously guilty of Pucci's substantive offenses.

How could this come about? First, the indictment in the case clearly asserts that the scheme to transfer the embossing machine and Pucci's purchases through fraudulent use of a credit card were part of a single conspiracy. Unquestionably, the *allegation* is made of a unitary offense. If proved, the allegation would support the application of the *Pinkerton* doctrine to this case.

As indicated, the *proof* is totally lacking. Pucci declares that the deal for the machine was unrelated to the use by any of the conspirators of a credit card. The machine deal contemplated that the manufactured cards would be sold, not used. Even if one considers the possibility that the trier of fact might decline to believe Pucci's testimony on this critical point, there is nothing else in the record on which the prosecution can rely.

Despite the failure of proof, the trial court allowed the case to go to the jury. This was an error. The trial judge then compounded the error by misinstructing the jury, *inter alia*, that the definition of a single conspiracy would be found in the indictment. The trial judge made the unsupported allegations of the indictment the standard to govern the sufficiency of evidence by the jury: allegations govern proof instead of proof governing allegations.

The trial court aggravated the problem by his further instructions on the nature of a single conspiracy and, particularly, his misstatement of the defense argument that Pucci's behavior fell outside the object of the conspiracy in the machine deal. It was not petitioner's contention that one conspiracy stopped and another began. The court in-

structed the jury on that possibility. It was not petitioner's contention that the evidence regarding the embossing machine deal failed to show a purpose to defraud Diners' Club. The court instructed the jury on that possibility. It was petitioner's contention that Pucci's acts were his own and not in furtherance of the enterprise for transfer of the embossing machine. The court never instructed the jury adequately or accurately on that issue.

The Court of Appeals below was openly troubled by the feebleness of any link between Pucci's use of a credit card and the criminal enterprise. The court describes the issue as "a more serious problem." The court below solved the "more serious problem" by twin devices. One, the court asserted without the slightest support in the record that: "The conspiracy did contemplate use of the cards and there was actual use by Pucci and desired use by Travers." To the extent that this implies that the conspiracy contemplated use of credit cards *by the conspirators*, it is plainly and completely wrong. The record is entirely to the contrary. In that light, the court's quoted sentence is a logical monstrosity, destroying any rationality to the *Pinkerton* doctrine.

The appellate court's second solution to the "more serious problem" is the ascription of an unreviewable fact-finding function to the jury. Disregarding the blatant errors in the instructions and the absence of sufficient evidence to submit the issue to the jury at all, the court concludes that the jury must have found that Pucci's activities came within the purposes of a single conspiracy and in pursuance thereof.

The handling of this question in the trial court and the court below is so egregious as to require the intervention of this Court. Undoubtedly, the Solicitor General will follow the Court of Appeals and attempt to paper over the plethora of mistakes by the customary assertion that this is a mere issue of fact that can comfortably be left to the lower courts. Such an effort to sweep the "more serious problem" under

the rug should fail. There are important, vital questions of procedure, transcending the particular facts of this case, that merit the attention of this Court.

The conspiracy offense is a dangerously malleable concept that needs continual watchfulness on the part of this Court to prevent its use oppressively and carelessly. That is especially true when the conspiracy device is employed to attach criminal liability for multiple substantive crimes that stretch out and away from the core of the unlawful enterprise. The time has come, we submit, for this Court to review again the doctrine of the *Pinkerton* case and to make real, in context, its admonition that criminal liability does not attach for substantive offenses if not in fact committed in furtherance of the conspiracy, if not falling within the scope of the unlawful project, or if merely part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement. The dictum in *Pinkerton* declaring these principles is not now effective, as the record of this case sadly reveals.

III. Whether the Crude Introduction Into Evidence, in a Conspiracy Trial Before a Jury, of Documents and Testimony Tending to Show Large Numbers of Offenses Similar But Unrelated to the Scheme of Which the Defendants Were Charged, Can Be Justified on the Ground That the Extraneous Evidence Was a "Colorful Backdrop," or Was an Illustration of the Size of the Potential Loss That Might Have Been Inflicted by Defendants' Scheme, or Was "Collateral to the Facts Upon Which the Conspiracy Was Based."

The prosecution in this case deliberately contaminated the record with inflammatory evidence of the size and frequency of credit card frauds against the Diners' Club, as reflected in the investigations conducted by that organization.

The jury was advised of the thousands of illegal transactions and the great sums of money involved. There were hundreds of "hot cards" produced for the jury to see. In addition, the prosecution elicited testimony tending to show that some of the defendants in this conspiracy case had, on other occasions, been involved in some actual or contemplated illegal credit card transactions. The inflammatory nature of this type of evidence in any kind of trial is manifest. It is particularly mischievous in vague and ephemeral prosecutions for conspiracy. That is aggravated here by the apparently boundless notions in the courts' view of the extent of the conspiracy charge against the defendants.

The Court of Appeals below invented some highly original and imaginative excuses for this flagrant contamination of the record. The description of the evidence on the magnitude of Diners' Club frauds as a "colorful backdrop" is quite remarkable. The indulgence of the evidence of unrelated offenses or intentions to commit offenses by some of these defendants, on the ground that they were "collateral to the facts upon which the [charge] conspiracy was based," borders on the incredible. Excusing the hundreds of "hot cards" and the lists of thousands of illegal transactions involving in excess of $700,000.00 on the assertion that this illustrates the harm that might have followed from defendants' scheme is dangerously absurd. The only precedents for such reasoning are found in Alice in Wonderland.

This Court's Rules provide that it is a proper basis to request review by certiorari where a court of appeals ". . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for the exercise of this court's power of supervision." Rule 19(1)(b). Hopefully, the course of conduct that occurred in the trial court and the appellate court is not the accepted and usual course of proceedings in

federal conspiracy prosecutions. On that hopeful assumption, petitioner prays that this Court intervene to correct the intolerable departure in this case.

CONCLUSION.

For the foregoing reasons, petitioner respectfully submits that a writ of certiorari should be granted.

Respectfully submitted,

JACOB KOSSMAN,
Attorney for Petitioner.

Nov. 1970

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

Nos. 662-63, 680-81—September Term, 1969.
(Argued March 20, 1970 Decided July 24, 1970.)
Docket Nos. 34380, 34389, 34599-600

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN KELLERMAN, CHARLES RIVEZZO, PHILIP TRAVERS and JOSEPH VERGO,

Appellants.

Before:

MOORE and FEINBERG, *Circuit Judges;*
BONSAL,* *District Judge.*

Appeal by John Kellerman, Charles Rivezzo, Philip Travers and Joseph Vergo from judgments of conviction entered in the United States District Court for the Southern District of New York after a trial before Hon. Milton Pollack, *Judge,* and a jury.

Affirmed.

LEO NACHBAR, Brooklyn, N. Y., *for appellant John Kellerman.*

* Of the Southern District of New York, sitting by designation.

MICHAEL S. FAWER, New York, N. Y. (Neal J. Hurwitz and John S. Martin, Jr., New York, N. Y., of counsel), *for appellant Charles Rivezzo.*

DAVID M. MARKOWITZ, New York, N. Y., *for appellant Philip Travers.*

CHARLES A. STILLMAN, New York, N. Y. (Leonard S. Machtinger, New York, N. Y., of counsel), *for appellant Joseph Vergo.*

WALTER M. PHILLIPS, JR., Assistant United States Attorney, New York, N. Y. (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, New York, N. Y., Ross Sandler and Jack Kaplan, Assistant United States Attorney, New York, N. Y., of counsel), *for appellee.*

MOORE, *Circuit Judge:*

Four defendants, John Kellerman, Charles Rivezzo, Philip Travers and Joseph Vergo appeal from judgments of conviction after a jury trial upon an indictment charging (1) a conspiracy to violate the mail fraud statute, 18 U. S. C. § 1341 and (2) twenty substantive violations thereof. A co-defendant Joseph Pucci pleaded guilty during the trial to twelve of the twenty-two counts. Another defendant, Alphonse Confessore, also convicted, died before sentence. Judgment of acquittal as to all defendants was granted on count twenty-two.

The conspiracy was to sell and distribute counterfeit Diners' Club credit cards. Each defendant played a different role in the conspiracy. Beginning in February 1967

Diners' Club had its credit cards embossed by the Dashew Business Machines Co. where the defendant Confessore was employed as a mechanic to service its embossing machinery. A large machine known as a "databosser" performed the embossing operation. Confessore had access to this machine and to smaller portable embossing machines known as "datatypers." Confessore was a neighbor of the defendant Kellerman. In May 1967 Kellerman told the defendant Pucci that for $7,500 he would sell a portable embossing machine, credit cards and data cards containing the names and numbers of real Diners' Club cardholders. Pucci then approached the defendant Travers who indicated that he knew of someone who might be interested.

Thereafter Kellerman and Pucci met with Confessore who stated that the offer was his—not Kellerman's—and that no cards would be furnished with the machine. This information was relayed to Travers. At a subsequent meeting between Confessore, Pucci and Travers, Confessore agreed to supply 500 unembossed cards, the price to be increased to $10,000. Travers then introduced Pucci to the defendant Rivezzo who was represented as being interested in the Confessore offer. Rivezzo wished to see the machine and the cards.

The portable machine, a box of embossed and a box of unembossed cards were taken by Confessore and Kellerman to the basement area of a house in which the defendant Vergo and other tenants lived. The basement was apparently used by the tenants in common and was under the control of the landlord, Bini, and not of any particular tenant. There Vergo assisted in setting up the machine. Present also were Pucci, Rivezzo and Travers. They were unsuccessful in their attempt to cause the machine to function properly. A future meeting was scheduled. The machine and the embossed cards were left in Vergo's base-

ment, the unembossed cards being taken by Travers to his home.

The second attempt to operate the machine failed and Confessore told Pucci, Rivezzo and Travers that he would have to buy additional machines, an additional datatyper and a machine to tip the embossed characters in black. The money for this purchase was produced by Rivezzo. The purchase of the additional machines was consummated but no counterfeit cards were embossed by the defendants. Previously, however, Pucci had taken from the box of embossed cards a counterfeit card in the name of Joseph C. Giletto in replacement of a card which Confessore had given to him and which he thought was better suited to his appearance than the other counterfeit card in the name of an "Irishman." This Giletto card was used by Pucci on many occasions, Travers being present at times and on one occasion requesting use of the card for his benefit. These uses are the subject of the substantive counts, and include items ranging from $337.89 and $303.51 (Northeast and American Airlines, respectively) down to $11.10 at a restaurant. Other facts are set forth in connection with the consideration of defendants' claims of error.

Pucci was the principal witness for the Government; the other defendants did not testify. The appellate arguments advanced on behalf of each defendant must be considered separately.

Kellerman

With respect to the conspiracy count, Kellerman in effect attacks the sufficiency of the evidence relating him to the conspiracy. As to the substantive counts, Kellerman claims that Pucci's use of the Giletto credit card for himself did not establish Kellerman's guilt. Lastly, Kellerman complains that his counsel was not allowed on cross-examination to elicit Pucci's address at the time of trial.

Rivezzo

Rivezzo argues that the evidence, at best, showed a scheme to obtain blank credit cards, an embossing machine and to sell the embossed cards to third persons. Therefore, Rivezzo claims that no violation of the mail fraud statute has been established and that the indictment should be dismissed. He cites *Parr v. United States*, 363 U. S. 370 (1960) as requiring this result. As to the substantive counts, Rivezzo asserts that Pucci's use of the Giletto card was not in furtherance of any conspiracy in which he may have been involved. Errors in the admission of exhibits and certain allegedly irrelevant testimony are set forth as additional grounds for reversal.

Travers

Travers also relies on the *Parr* decision. He contends in addition that the actual use by Pucci and himself of the Giletto card would constitute a separate conspiracy and that there was insufficient evidence to connect that conspiracy with the larger one for which all were convicted.

Vergo

Vergo adopts the arguments advanced in the Kellerman and Rivezzo briefs and claims that they apply with even greater weight to him. He also urges (1) error in the denial of his motion to suppress certain evidence seized in Vergo's house without a warrant and (2) that our recent decision in *United States v. Bless*, 422 F. 2d 210 (2d Cir. 1970) require reversal of his conviction.

In an attempt to bring their case into close analogy with *Parr v. United States*, 363 U. S. 370 (1960), defendants would construe their conspiracy as merely involving the sale of an embossing machine, unembossed Diners' Club

cards and IBM cards. They argue that the scheme ended at this point, the sale would have been completed without any use of the mails and, hence, the fact situation in *Parr* is paralleled. However, this argument overlooks the nature of a Diners' Club card. The card has no value *qua* card. The conspirators hopefully were realizing $7,500 to $10,000 from a purchaser who in turn would capitalize on his purchase by selling and putting into circulation these spurious Diners' Club cards. In the hands of this ultimate purchaser, their value would be found in the obtaining of merchandise and services at the expense of the real cardholders and the suppliers. This ultimate use and the attainment of this ultimate objective required the use of the mails. The courts will not be so unworldly or naive as to be unaware of the vast volume of purchases made throughout this country and probably throughout the world by means of credit cards, Diners' Club and many others. No lesser knowledge was possessed by these conspirators.

Since the fraudulent use of a credit card constitutes mail fraud, so also does a conspiracy to put spurious cards into circulation. The *Parr* and *Kann*[1] cases, relied on by appellants do not present similar facts situations. In *Parr* the Supreme Court was quite explicit in limiting its decision to the particular facts before it. There certain employees of a School District used the District's credit card to obtain gasoline and services for themselves. The scheme was in effect misappropriation and embezzlement of the District's property. The crime was completed upon receipt of the gasoline and services. Once the property was received, the defendants had no further interest in the billing practices of the service stations involved. All that the Supreme Court held was "Here, as in *Kann*, '[t]he scheme in each case had reached fruition' when Carrillo and Garza

1. *Kann v. United States*, 323 U. S. 88 (1944).

[the District's employees] received the goods and services complained of. 'The persons intended to receive the [goods and services] had received [them] irrevocably. It was immaterial to them, or to any consummation of the scheme, how the [oil company] * * * would collect from the [District]. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.' 323 U. S. at 94."

Parr and *Kann* have been distinguished on a factual basis in *Kloian v. United States*, 349 F. 2d 291, 5th Cir. 1965, *cert. denied*, 384 U. S. 913 (1966) and in *Adams v. United States*, 312 F. 2d 137, 5th Cir. 1962. The Supreme Court itself in *United States v. Sampson*, 371 U. S. 75 (1962) distinguished *Parr* and *Kann* in upholding an indictment which alleged potential use of the mails as part of a scheme to defraud, a decision which Mr. Justice Douglas in his lone dissent felt "materially qualifies" *Parr v. United States*, 363 U. S. 370.

In *Kloian* the court pointed to the distinguishing features, saying: "There [*Parr* and *Kann*] the fraud operated through the abuse of offices held by defendants. It sounded in larceny after trust," 349 F. 2d at 294. Far more pertinent to the facts here is the court's comment in *Adams* that "Appellant's scheme reasonably contemplated the utilization of a commercial practice which, taken in its entirety, embraced the use of the mails," 312 F. 2d at 140.

Each defendant would isolate himself from a general conspiracy by claiming only partial participation. It is true that each defendant may not have been present on every occasion and each may have had a somewhat different role but the thread of continuity was as visible as Ariadne's thread which led Theseus safely through the Cretan labyrinth after his Minotaur adventure. The thread here is less serpentine—Confessore-Kellerman; Kellerman-Pucci; Pucci-Travers; Travers-Rivezzo, and then

to Vergo's house to try to operate the machine and there to store a box of cards, Vergo assisting. The evidence was clearly adequate to justify the jury's verdict.

The point made that the machine failed to operate and that, therefore, the conspiracy was frustrated and aborted is not legally sound. A conspiracy does not require successful completion of the objects thereof.

II.

The substantive counts present a more serious problem. Was Pucci's surreptitious filching of a card to replace the card Confessore had given him and a card for his girlfriend a plausible part of the conspiracy? The conspiracy did contemplate use of the cards and there was actual use by Pucci and desired use by Travers.

Rivezzo, in particular, claims that under *Pinkerton v. United States*, 328 U. S. 640 (1946), Pucci's use of his card "did not fall within the scope of the unlawful project," *id.* at 647, and that at best it was a separate Pucci-Travers conspiracy. This argument is based upon the assumption that the proof clearly showed two separate conspiracies instead of one and that proof of the alleged Pucci-Travers conspiracy and Pucci's use of the card was prejudicial to him on the conspiracy count. However, the indictment charged only a single conspiracy. It was for the jury to determine whether Pucci's and Travers' activities came within the purposes of that conspiracy and in pursuance thereof. If, as the jury must have found, Rivezzo was a member of the conspiracy, he was properly convicted under the *Pinkerton* doctrine on the substantive counts as well.

III.

Reversible error is asserted because of the receipt in evidence of 110 and 114 embossed Diners' Club cards (Government's Exhibits 1 and 2, respectively). Defendants

argue that there was no explanation of the part, if any, which these cards played in the conspiracy. Of a somewhat similar character are Exhibits 7 and 31. Exhibit 7 was a schedule of duplicate embossed Diners' Club cards uncovered by Diners' Club investigators during the period February 1967 through March 1968 together with certain information relating to the cards. This schedule had 636 entries, 224 of which were the cards listed in Exhibits 1 and 2. Exhibit 31 contained 415 entries and was designed to show the total amount of fraudulent charges incurred by the use of duplicate cards over a period from February 1967 to June 1968, a total of $719,887.23. Both Exhibits (7 and 31) were stricken by the Court prior to submission of the case to the jury.

During the trial of every case, the proof has to be introduced step by step and through individual witnesses. It is often impossible to foresee the relevance of testimony or of an exhibit—particularly in the early stages of the trial. Hence the necessity of receiving the testimony or exhibit "subject to connection"—an expression which is anathema to most trial lawyers. If the testimony or exhibit is ultimately stricken, of course, there is prejudice to the party against whom it is temporarily received. The effectiveness of the judge's charge to disregard such evidence has been debated and challenged for generations. The answer is probably to be found by trying to evaluate the degree of prejudice because no instruction can erase from any juror's mind that which he has just heard or seen. But the entire jury system is dependent upon the assumption—whether it be fiction or not—that the jury will follow the court's instructions. It is only in extreme cases that this fiction is disregarded. Witness the change from *Delli Paoli*[2] *to Bruton.*[3]

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2. *Delli Paoli v. United States,* 352 U. S. 232 (1957).
3. *Bruton v. United States,* 391 U. S. 123 (1968).

In this case the testimony and exhibits supplied a colorful backdrop and illustrated the size of the potential loss which might be inflicted on Diners' Club by the success of the conspiracy but their introduction does not constitute reversible error because the proof of the conspirators' acts was more than adequate to enable the jury to find them guilty regardless of the monetary damage inflicted on Diners' Club under other circumstances.

IV.

After suspicion had focused on Confessore, he made statements to Diners' Club employees which Rivezzo claims were inculpatory as to him and not contemplated by, or in furtherance of, the conspiracy. Admission of this testimony, Rivezzo argues, was reverisible error. It may well have been an unsuccessful attempt by Confessore to exculpate himself or a statement to divert Diners' Club suspicions from his co-conspirators. In any event admission of this testimony does not come within the ban of *Bruton*.

V.

Other errors advanced by Rivezzo, namely, the Stein testimony (American Express card given by Confessore to Stein prior to commencement of the conspiracy with promise of Diners' Club card in the future), the Chincotta testimony (purchase by Chincotta from Travers of blank Diners' Club cards on July 24, 1967 after arrest of Confessore and Pucci) and Pucci's testimony regarding Confessore's offer of a proposition whereby Pucci could earn $75,000 in an unrelated criminal venture (stricken by the Court) do not require reversal. At most they were collateral to the facts upon which the conspiracy was based. In the same category was the Court's curtailment of cross-

examination as to Pucci's specific address. The denial of the motion to suppress was proper. The area searched was not Vergo's exclusively. Furthermore, the search was made with the consent of the owner, Bini.

The judgments of conviction are affirmed.

APPENDIX B.

Judgment.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of July 1970.

Present:

HON. LEONARD P. MOORE, U. S. C. J.
HON. WILFRED FEINBERG, U. S. C. J.
HON. DUDLEY B. BONSAL, U. S. D. J.

UNITED STATES OF AMERICA
Appellee

v.

JOHN KELLERMAN, CHARLES RIVEZZO, PHILIP TRAVERS AND JOSEPH VENUTO
Defendant-Appellants

APPEAL FROM THE UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX C.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

NOS. 34380, 34389, 34559, 34600

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

ALPHONSE M. CONFESSORE, ET AL.
Defendants,

JOHN KELLERMAN, A/K/A JOHNNY "DOT", CHARLES RIVEZZO, AND PHIL TRAVERS, A/K/A PHIL TAVARIZZI, JOSEPH VERGO,
Defendants-Appellants,

(AND 3 OTHER CASES).

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant Charles Rivezzo and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD,
Chief Judge.

October 13, 1970

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Nos. 34380, 34389, 34559, 34600

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

ALPHONSE M. CONFESSORE, ET. AL.
Defendants,

JOHN KELLERMAN, A/K/A JOHNNY "DOT", CHARLES RIVEZZO, AND PHIL TRAVERS, A/K/A PHIL TAVARIZZI, JOSEPH VERGO,
Defendants-Appellants,

(AND 3 OTHER CASES).

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate having been filed herein by counsel for the appellant Charles Rivezzo,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED, and the motion for a stay of mandate is granted subject to the provisions of Rule 41(b).

LEONARD P. MOORE, U. S. C. J.
WILFRED FEINBERG, U. S. C. J.
DUDLEY B. BONSAL, U. S. D. J.

October 13, 1970

APPENDIX D.

Extract of Testimony of Joseph Pucci.

(Tr. 147)

JOSEPH PUCCI, called as a witness by the Government, being first duly sworn, testified as follows:

• • •

[By Mr. Phillips for the Government]

(Tr. 166)

Q. What occurred after you all entered the basement?

A. Vergo opened up the first bin and there was a light hanging in there. Confessore plugged in the machine to that light, the outlet of the light, and started to work the machine, but it wouldn't work right. It wouldn't stamp out the card the way it was supposed to. He said he needed an additional part and his tools.

Q. What cards are you referring to?

A. He had the unembossed cards and the embossed cards there. He was practicing on unembossed cards.

Q. What kind of cards were they?

A. Diners' Club.

Q. What did he say concerning this machine?

A. He said he needed an additional part, that it wouldn't stamp out the cards right; that he needed his tools.

Q. What did you do while Confessore was working with the machine?

(Tr. 167)

A. I went through the box of embossed cards and I took out two cards for myself and put back the Irishman's card, the card with the Irish name on it because it didn't fit my description.

Q. Do you recall the names on those cards?

A. One was Joseph C. Giletto. The other was a woman's name, Sylvia Berry.

Q. Where did these cards come from that you took the Joseph Giletto card from?

A. Those were the cards that Al Confessore brought with him.

Q. Do you know how many cards were in that box that you took the Giletto card from?

A. Approximately 290.

* * *

[By Mr. Fawer for petitioner]

(Tr. 241)

Q. You testified that you took a card out of——

Mr. Fawer: I withdraw that. I'm sorry.

Q. That Mr. Confessore had a group of embossed credit cards in his home. Am I accurate?

A. Yes.

Q. At one point when you first met him?

A. Yes.

Q. And you asked if you could have one of the cards. Am I accurate?

A. Right.

Q. And he gave you one and it had apparently the last name with the name of—it had an Irish derivation to it, am I right?

A. Yes.

Q. Do you remember the name precisely?

A. No.

(Tr. 242)

A. No.

Q. But it was Irish, right?

A. Yes.

Q. You wanted this card for the same reason that you had the American Express card with Vincenti's name on it to live off, am I accurate?

A. You are.

Q. And you intended to live in motels, hotels, restaurants—eat in restaurants, buy liquor with the card; am I accurate?

A. You are.

Q. Simply, when you took the Giletto card, is it not a fact you wanted it for precisely the same reason?

A. Yes, sir.

Q. And you used it for precisely the same reason?

A. Yes, sir.

Q. Exactly, right?

A. Yes, sir.

Q. Is it not a fact, Mr. Pucci, that at no time was it any part of this deal that we have been discussing for any of the parties here to buy embossed credit cards?

(Tr. 243)

A. I don't understand the question.

Q. I will repeat it.

Is it not a fact that it was not part of the deal between yourself, Confessore, Mr. Rivezzo, Mr. Travers, to buy from Confessore already embossed credit cards?

A. In other words, the deal was—you are asking me——

Q. That that was not part of the deal?

A. Embossed cards?

Q. Right.

A. Right.

Q. So we understand, that had no part of the deal?

A. I tried to get them, but he wouldn't give them to me.

Q. I didn't ask you that. I will come to that. No part of the deal that we are talking about involved already embossed credit cards?

A. Right.

Q. The only already embossed credit card was a card that you personally got from Mr. Confessore for your own use; namely, the Giletto card?

You are shaking your head.

(Tr. 244)

A. I got that card in the basement, not from Giletto, he didn't—not from Confessore, he didn't know about it.

Q. Whose cards were they at that time?

A. His.

Q. Confessore? Did you take that card, unknown to Confessore? For your own use?

A. Yes.

Q. You took two cards, one for your use and one for Katherine Mirabella's use, your girl friend?

A. Yes.

Q. Is that accurate?

A. Yes.

The Court: Will you step back again, please?

Mr. Fawer: Yes, sir.

Q. And you took those cards——

Mr. Fawer: Excuse me one second.

Q. You took those cards unbeknownst to anyone else at that time, is that accurate?

A. Yes.

* * *

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IN THE

Supreme Court of the United States

October Term, 1970.

No. 941.

CHARLES RIVEZZO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

MEMORANDUM FOR THE PETITIONER.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia, Pa. 19107
Attorney for Petitioner.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. ~~491~~ 941.

CHARLES RIVEZZO

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MEMORANDUM FOR THE PETITIONER.

On October 26, 1970 the Truth in Lending Act (82 Stat. 146) was amended by adding the following provision relating to credit cards. § 134 entitled **Fraudulent use of Credit Card** provides:

> Whoever, in a transaction affecting interstate or foreign commerce, uses any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain goods or services or both, having a retail value aggregating $5,000 or more, shall be fined not more than $10,000 or imprisoned not more than five years or both.

We submit that this Act is a clear expression of Congress that the misuse, as in this case, of credit cards were never intended to be prosecuted under the Federal Mail Fraud Statute.

Respectfully submitted,

JACOB KOSSMAN,
Attorney for Petitioner.

Nov. 1970.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 941

CHARLES RIVIERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner and others were convicted of one count of conspiracy to violate 18 U.S.C. 1341, and 19 counts of mail fraud, in violation of 18 U.S.C. 371, 1341, 1342. Petitioner was given concurrent sentences of two years' imprisonment on all counts. The court of appeals affirmed (Pet. App. A1-A11).

As in the companion case of *Kellerman* v. *United States*, O.T., 1970, No. 736, certiorari denied, December 14, 1970,[1] we rely on the opinion of the court of appeals; we add only the following with respect to two of petitioner's contentions.

First, citing *Parr* v. *United States*, 363 U.S. 370, and *Kann* v. *United States*, 323 U.S. 88, petitioner argues that the scheme for the sale and distribution of counterfeit credit cards did not involve use of the mails within the meaning of 18 U.S.C. 1341. But the fraudulent use of a card over a period of several weeks without detection (Tr. 190-200) by co-defendant and co-conspirator Pucci depended for its success upon the time lag, necessarily caused by use of the mails, between the use of a credit card and the discovery that the use was fraudulent. Pucci thus caused use of the mails in connection with the fraud. *Adams* v. *United States*, 312 F. 2d 137 (C.A. 5); *United States* v. *Hendrickson*, 394 F. 2d 807 (C.A. 6), certiorari denied, 393 U.S. 1031.

Second, petitioner claims that Pucci's use of the credit card was an aberration, entirely outside the scope of the conspiracy. But hundreds of counterfeit cards were involved; Confessore, one of the co-conspirators, supplied embossed cards ready for immediate use; these were brought to another co-conspirator's residence, where Pucci took one; petitioner himself contemplated the use of these cards, as indicated by his statement that it did not matter whether Con-

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[1] A copy of our brief in opposition in that case is being supplied to petitioner's counsel.

fensore could be located because petitioner and his co-conspirators still had the embossed cards (Tr. 189, 265); and, finally, one of the co-conspirators, Travers, accompanied Pucci on several occasions when he used the card and once asked him to purchase airline tickets with it, which he did (Tr. 190-192, 195). The claim petitioner now raises—that the substantive offenses were part of a separate conspiracy in which he had no part—was squarely placed before the jury by the arguments of counsel for the defense and the government (e.g., Tr. 490-501, 514, 521-522, 530-532), and by the trial court's charge (Tr. 617). The court of appeals therefore properly relied on the jury's resolution of this factual issue (Pet. App. A8).

It is respectfully submitted that the petition for a writ of certiorari should therefore be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1970.

No. 941.

CHARLES RIVEZZO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY.

The nature of the government's opposition to review in this case suggests that a short reply may be of assistance to the Court.

Only this Court should overrule its decisions in *Parr v. United States*, 363 U. S. 370, and *Kann v. United States*, 320 U. S. 88, and not the courts below or the Solicitor General.

In Kann v. United States, supra, this Court stated (page 94):

> "The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question

were for the purpose of executing the scheme, as the statute requires." (Footnote omitted.)

And both the majority and minority opinions in *Parr* cited *Kann* as follows:

> "If the use of the mails occurred not as a step in but only after the consummation of the scheme, the fraud is the exclusive concern of the States." (Pages 389-390, 397.)

In this case, Pucci, when he used the credit card on eleven different occasions to obtain food, lodging and airplane tickets from the various suppliers in amounts ranging from $12.00 to $330.00, for a total amount of slightly over $1,000.00, received the items "irrevocably". It was just as immaterial to Pucci as it was to Kann how the suppliers would be paid or to any consummation of the scheme. There was no dependence by anyone, suggested *for the first time* by the government on any "time lag" because of the use of the mails. Obviously, there is a time lag in all cases of fraud between execution and discovery but all that Pucci was concerned with was using the items that he irrevocably received by means of a stolen credit card. The mailings occurred not as a step in but only *after* the consummation of the scheme. Since not even a theory of "time lag" was dreamed of by the prosecutor, no evidence was produced in the trial court to show that the use of the mails here involved a "time lag" different than if the mails were not used. Indeed, since the suppliers and the office of the Diners Club were located in New York City, this would have been impossible.

The case was tried on the theory that the misuse of credit cards meant the misuse of the mails. But Congress was not of that belief; otherwise a Credit Card Act providing criminal penalties for the unauthorized use of

credit cards would not have been enacted. A supplemental brief was filed in this Court calling attention to the Credit Card Act, but the Solicitor General ignored it just as this Court's decisions in *Parr* and *Kann* were ignored.

Since the government now defends this prosecution under the Mail Fraud Act on the merits, additional recurring problems in the various federal courts will continue to exist until this Court again decides whether a wrongful scheme for use of a credit card constitutes a violation of the federal mail fraud statute. In our Petition is data from 1967 on the number of credit cards outstanding and the number of lost and stolen cards. Since then, according to an Associated Press dispatch of December 21, 1970, the District Attorney of the Borough of Brooklyn, New York, has stated that 1.5 million credit cards are lost or stolen each year. Within the past weeks, Congress moved to limit federal criminal jurisdiction to fraudulent schemes aggregating $5,000.00 or more. The decision of the court below, if allowed to stand, negates that limitation and creates a major extension of the workload of the federal judicial system.

It is respectfully submitted that the petition for a writ of certiorari should therefore be granted.

JACOB KOSSMAN,
Attorney for Petitioner.

December 1970